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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
NORTHERN DIVISION

In re

CHANNEL TECHNOLOGIES GROUP, LLC,
Debtor.

CORPORATE RECOVERY ASSOCIATES,
LLC, as Trustee for the Liquidating Trust of
Channel Technologies Group, LLC,

Plaintiff,

v.

BLUE WOLF CAPITAL PARTNERS, LLC, et
al.,

Defendants.

§ CASE NO. 9:16-BK-11912-DS

§

§ Chapter 11

§

§ ADV NO. 9:18-AP-01058-DS

§

§ **PLAINTIFF'S RESPONSE TO**

§ **DEFENDANTS FIDUS**

§ **INVESTMENT CORPORATION,**

§ **FIDUS MEZZANINE CAPITAL II,**

§ **L.P., AVANTE MEZZANINE**

§ **PARTNERS SBIC, LP, AVANTE**

§ **MEZZANINE PARTNERS II, INC.'S**

§ **MOTION TO DISMISS SECOND**

§ **AMENDED COMPLAINT**

§

§ Hearing

§ Date: September 10, 2019

§

§ Time: 1:00 p.m.

§

§ Place: Courtroom 1639

§

§ United States

§

§ Bankruptcy Court

§

§ 255 E. Temple Street

§

§ Los Angeles, CA 90012

TABLE OF CONTENTS

I. INTRODUCTION	1
II. RELEVANT FACTUAL BACKGROUND	2
III. LEGAL STANDARD	5
IV. ARGUMENT.....	7
A. Alter Ego Transfers	7
1. The Trustee may maintain fraudulent transfer claims under an alter ego theory of liability	7
2. The Trustee sufficiently states claim for the avoidance of actual and constructive fraudulent transfers pursuant to the Bankruptcy Code	10
3. The Trustee sufficiently states claim for the avoidance of actual and constructive fraudulent transfers pursuant to California law	15
B. No Benefit Transfers.....	16
1. The Trustee did not receive any value in exchange for transfers made to the Mezzanine Lenders	16
2. The Trustee sufficiently states claim for the avoidance of actual and constructive fraudulent transfers pursuant to the Bankruptcy Code and California law	18
3. The Trustee Sufficiently States Claims for Avoidance and Recovery of Preferential Transfers	20
V. CONCLUSION.....	25
PROOF OF SERVICE	27

TABLE OF AUTHORITIES

Cases

ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999 (9th Cir. 2014) 20

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 6

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) 6

Attebury Grain LLC v. Grayn Co., 721 F. App'x 669 (9th Cir. 2018) 13

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 5, 6

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) 5

Burbank Generators, Inc. v. Gill, 48 B.R. 205, 206 (C.D. Cal 1985) 16

Danning v. Miller (In re Bullion Reserve of N. Am.), 922 F.2d 544 (9th Cir. 1991) 11

Danning v. Miller (In re Bullion Reserve of N. Am.), 922 F.2d 544, 547 (9th Cir. 1991) 11

Erickson v. Pardus, 551 U.S. 89 (2007) 6

Erickson v. Pardus, 551 U.S. 89, 93 (2007) 6

Gladstone v. Schaefer (In re UC Lofts on 4th, LLC), 2015 WL 5209252 (9th Cir. BAP Sep. 4, 2015) 25

Henry v. Official Comm. of Unsecured Creditors of Walldesign, Inc. (In re Walldesign, Inc.), 872 F.3d 954 (9th Cir. 2017) 11

Henry v. Official Comm. of Unsecured Creditors of Walldesign, Inc. (In re Walldesign, Inc.), 872 F.3d 954, 959 (9th Cir. 2017) 11

Henry v. Weiss, 138 S. Ct. 2575 (2018) 9

Hsu v. Puma Biotechnology, Inc., 213 F. Supp. 3d 1275 (C.D. Cal. 2016) 24

In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) 13, 14

In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541 (9th Cir. 1994) 6

In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 (9th Cir. 1994) 6

1	<i>In re Lucas Dallas, Inc.</i> , 185 B.R. 801, 807 (B.A.P. 9th Cir. 1995)	17
2	<i>In re Pajaro Dunes Rental Agency, Inc.</i> , 174 B.R. 557, 578 (Bankr. N.D. Cal. 1994).....	16
3	<i>In re Pajaro Dunes Rental Agency, Inc.</i> , 174 B.R. at 578.....	17
4	<i>In re Schuman</i> , 81 B.R. 583 (B.A.P. 9th Cir. 1987)	22
5	<i>In re Stern</i> , 345 F.3d 1036 (9th Cir. 2003).....	13
6	<i>In re Walldesign, Inc.</i> , 872 F.3d 954, 964 (9th Cir. 2017)	9
7	<i>Klein v. King & King & Jones</i> , 571 Fed. App'x. 702 (10th Cir. 2014)	17
8	<i>Klein v. King & King & Jones, P.C.</i> , 2:12-CV-00051, 2013 WL 4498831, at *3 (D. Utah Aug. 19, 2013)	17
9	<i>LaChapelle v. Dong Kwan Kim</i> , 2015 U.S. Dist. LEXIS 161801 (N.D. Cal. Dec. 1, 2015)	14
10	<i>LaChapelle v. Dong Kwan Kim</i> , 2015 U.S. Dist. LEXIS 161801 *20, 2015 WL 7753235 (N.D. Cal. Dec. 1, 2015).....	14
11	<i>Las Palmas Assocs. v. Las Palmas Ctr. Assocs.</i> , 235 Cal. App. 3d 1220, 1249–50 (1991)	8
12	<i>Lee v. City of L.A.</i> , 250 F.3d 668 (9th Cir. 2001)	23, 24
13	<i>opez v. Smith</i> , 203 F.3d 1122, 1127 (9th Cir. 2000)	26
14	<i>Shaoxing Cty. Huayue Imp. & Exp. v. Bhaumik</i> , 191 Cal. App. 4th 1189, 1197 (2011)	8
15	<i>Singh v. Am. Honda Fin. Corp.</i> , 925 F.3d 1053 (9th Cir. 2019).....	24
16	<i>Twombly</i> , 550 U.S. at 556	6
17	<i>TwoRivers v. Lewis</i> , 174 F.3d 987 (9th Cir. 1999)	7, 24
18	<i>TwoRivers v. Lewis</i> , 174 F.3d 987, 991 (9th Cir. 1999).....	7, 24
19	<i>United States v. Hempfling</i> , 431 F. Supp. 2d 1069 (E.D. Cal. 2006).....	6
20	<i>United States v. Hempfling</i> , 431 F. Supp. 2d 1069, 1075 (E.D. Cal. 2006)6	
21	<i>Van Buskirk v. CNN, Inc.</i> , 284 F.3d 977 (9th Cir. 2002)	7

Van Buskirk v. CNN, Inc., 284 F.3d 977, 980 (9th Cir. 2002) 7

Statutes

11 U.S.C. § 544(b)(1)..... 11

11 U.S.C. § 548(a)(1)(A)..... 11

11 U.S.C. § 548(a)(1)(B)..... 11, 14

11 U.S.C. § 548(c) 9, 10, 25

11 U.S.C. § 550(a) 11

11 U.S.C. §§ 544(b)(1), 548(a)(1)(B) 11

2 Moore’s Fed. Practice – Civ. § 9.03 6

2 Moore’s Fed. Practice Civ. § 8.04 5

60 F.3d 591 (9th Cir. 1995) 6

Cal. Civ. Code § 3439.03(2) 15

Cal. Civ. Code § 3439.04(1) 15

Cal. Civ. Code § 3439.04(a)(1)..... 13

Cal. Civ. Code § 3439.09(1) 15

Cal. Civ. Code §§ 3439.04(1) 15

Fed R. Civ. P. 9(b)..... 6

1 Plaintiff Corporate Recovery Associates, LLC, solely in its capacity as Trustee
2 for the Liquidating Trust of Debtor Channel Technologies Group, LLC (the
3 “Trustee”), by and through its undersigned counsel, hereby responds to Defendants
4 Fidus Investment Corporation, Fidus Mezzanine Capital II, L.P., Avante Mezzanine
5 Partners SBIC, LP, Avante Mezzanine Partners II, Inc.’s (collectively, “Defendants”
6 or the “Mezzanine Lenders”) Motion to Dismiss and, in support hereof, hereby shows
7 as follows:
8

9 I. INTRODUCTION

10 The Trustee’s Second Amended Complaint contains sufficient factual detail
11 to establish the plausibility of its claims that (1) Channel Technologies Group, LLC’s
12 (the “Debtor”) management and the Blue Wolf Entities directed the Debtor to make
13 actual and constructive fraudulent transfers in violation of the Bankruptcy Code
14 and California Law to the Mezzanine Lenders; (2) that the Trustee has the right to
15 seek the avoidance of those transfers to the Mezzanine Lenders; and (3) that the
16 Trustee may avoid preferential transfers to the Mezzanine Lenders. The Mezzanine
17 Lenders do not meet their burden to prove that the Trustee’s well-pled claims are
18 implausible. While the Mezzanine Lenders improperly request that the Court take
19 judicial notice of unauthenticated and challenged evidence, the Court should deny
20 this request.
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24 The Trustee alleges detailed facts demonstrating how the Debtor’s
25 management and the Blue Wolf Entities took advantage of their control of the
26 Debtor to exhaust and transfer the entirety of the Debtor’s assets to themselves and
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1 for the benefit of other separate entities absent the Debtor receiving any reasonably
2 equivalent value. Faced with the Trustee's well-pled factual allegations, the
3 Mezzanine Lenders misstate the Trustee's pleading burden and improperly asks the
4 Court to decide complex factual issues *at the pleading stage (when the Trustee's*
5 *allegations must be accepted as true)*—and without the benefit of discovery.
6 Thus, the Mezzanine Lenders' motion must be denied.
7

8 II. RELEVANT FACTUAL BACKGROUND

9 On or about December 2011, Blue Wolf Capital Partners, LLC, acting through
10 its executive management team of Adam Blumenthal, Haranjeet Narulla, and
11 Charles Miller among others, reached an agreement to purchase the Debtor. Blue
12 Wolf Capital Partners directed one of its wholly owned and controlled subsidiaries—
13 Blue Wolf Capital Advisors—to direct another subsidiary owned and controlled by
14 Blue Wolf Capital Partners—Blue Wolf Capital Fund—to form and fund BW Piezo
15 Holdings, LLC ("BW Piezo") (collectively, the "Blue Wolf Entities") for the sole
16 purpose of acquiring the Debtor, a California-based manufacturer of piezoelectric
17 equipment. Second Am. Compl. ¶ 24, June 28, 2019, ECF No. 156 [hereinafter
18 "SAC"]. After acquiring the Debtor, Blue Wolf Capital Partners, through the Blue
19 Wolf Entities, operated BW Piezo and the Debtor as alter egos of each other and as
20 a single business enterprise, routinely commingling funds and assets between the
21 different companies. SAC ¶¶ 24–26, 29–32, 37–39.
22

23 Sometime in 2013, the Debtor's management, under Blue Wolf Capital
24 Partners' control, decided to expand the Debtor's business and acquire H.C.
25 Materials, Inc., a crystal manufacturer. *Id.* ¶ 28. In October 2013, Blue Wolf
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Capital Partners, acting through BW Piezo, forced the Debtor and its subsidiary to join BW Piezo and AM as borrowers in the Amended and Restated Credit Agreement with OneWest Bank. *Id.* ¶ 32. At the same time, Blue Wolf Capital partners acting through BW Piezo, forced the Debtor to enter into separate loan and investment agreements (the “the Debtor AM Loans”) with Fidus Investment Corporation; Fidus Mezzanine Capital II, L.P.; Avante Mezzanine Partners SBIC, LP; Avante Mezzanine Partners II, Inc. (the “Mezzanine Lenders”). *Id.* ¶¶, 30, 33. In addition, CIT Bank loaned BW Piezo, CTG Advanced Materials (“AM”), and the Debtor over \$31,000,000, along with a \$8,000,000 revolving loan facility, to help purchase H.C. Materials. *Id.* ¶ 32.

After securing the financing, Blue Wolf Capital Partners, acting through BW Piezo, the Debtor, and AM, used the loan proceeds and the Debtor’s cash to acquire H.C. Materials’ assets for \$48 million. *Id.* ¶ 35. Immediately, the Blue Wolf Entities, Blumenthal, and Narulla issued press releases and represented to the public that the Debtor had acquired H.C. Materials. *Id.* Blue Wolf Capital Partners’ actions left the Debtor saddled with significant debt and limited the Debtor’s business. *Id.*

Despite these public representations, Blue Wolf Capital Partners, acting through its executive management team and BW Piezo, surreptitiously decided to segregate the companies on paper. *Id.* ¶ 36. The new entity named AM purchased H.C. Materials’ assets; however, Blue Wolf structured AM to be a sister company to the Debtor under the ownership of BW Piezo, instead of as a wholly-owned subsidiary of the Debtor. *Id.*

1 The paper segregation was fictional. Despite surreptitiously structuring AM
2 as a sister company, Blue Wolf Capital Partners, acting through its executive
3 management team and the Debtor's alter ego BW Piezo, forced the Debtor to use its
4 assets to make payments to the Mezzanine Lenders and to CIT Bank, N.A. pursuant
5 to the loan agreements. *Id.* ¶ 37. The companies, along with BW Piezo, were then
6 operated as a single-business enterprise by the Debtor's management. *Id.*
7

8 From December 20, 2013 to December 31, 2015, the Debtor made regular
9 payments to Fidus Investment Corporation and Fidus Mezzanine Capital II, L.P.
10 totaling \$1,959,987.31. *Id.* ¶ 38. From December 19, 2013 to February 18, 2016, the
11 Debtor made regular payments to Avante Mezzanine Partners SBIC, LP and Avante
12 Mezzanine Partners II, Inc. totaling \$1,957,300.44. *Id.*
13

14 After years of commingling assets and depleting the Debtor's resources for the
15 benefit of AM and Blue Wolf Capital Partners, Blue Wolf Capital Partners learned
16 that the Debtor was insolvent. *Id.* ¶¶ 40–41. In late 2015, Blue Wolf Capital
17 Partners, realizing that it needed to create separation between BW Piezo, the
18 Debtor, and AM prior to the Debtor's bankruptcy, decided to sell AM. *Id.* ¶ 42.
19

20 On or about March 2016, Blue Wolf Capital Partners, through its executive
21 management team and the Debtor's alter ego BW Piezo, sold AM for approximately
22 \$73 million to CTS Corporation. *Id.* ¶ 46. Instead of returning to the Debtor the
23 proceeds from the sale of assets of AM, Blue Wolf Capital Partners, acting through
24 the Debtor's alter ego BW Piezo, structured the transaction to have CTS Corporation
25 transfer the proceeds to Blue Wolf Capital Partners and its shell companies, CIT
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27
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1 Bank, N.A., the Mezzanine Lenders, Pengdi Han, and to Blue Wolf Capital Partners
2 insiders as bonus payments. *Id.* In fact, because BW Piezo did not even have its
3 own bank account, Blue Wolf Capital Partners directed CTS Corporation to transfer
4 the proceeds from the sale of AM to Blue Wolf Capital Fund. *Id.* Specifically, as
5 part of the AM sale, the Debtor transferred (1) \$7,264,770.39 to Fidus Investment
6 Corporation and Fidus Mezzanine Capital II, L.P.¹; (2) \$7,263,263.90 to Avante
7 Mezzanine Partners SBIC, LP; and (3) the Debtor transferred \$1,340.39 to Avante
8 Mezzanine Partners II, Inc.
9

10 In addition to these transfers, Blue Wolf Capital Partners, through its
11 executive management team and the Debtor's alter ego BW Piezo, transferred more
12 than \$400,000 to the Mezzanine Lenders as equity distributions (the "Equity
13 Distributions"). Second Am. Complaint, Schedule B.
14

15 Shortly thereafter, the Blue Wolf Entities directed the Debtor to file for
16 bankruptcy in October 2016, leaving the Debtor's unsecured creditors "holding the
17 bag." *Id.* ¶ 48.
18

19 III. LEGAL STANDARD

20 All pleadings setting forth claims for relief must include a short and plain
21 statement of the claim showing that the pleader is entitled to relief. 2 Moore's Fed.
22 Practice Civ. § 8.04. A plaintiff must plead "enough facts to state a claim to relief
23 that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
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26
27 ¹ The transfer was made to Fidus Investment Corporation's bank account; however, a "For Further
Credit" designation was included to route the transfer to Fidus Mezzanine Capital II, L.P. SAC ¶ 65.

1 “[F]acial plausibility” exists “when the plaintiff pleads factual content that allows
2 the court to draw the reasonable inference that the defendant is liable for the
3 misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The federal pleading
4 standard “does not require ‘detailed factual allegations,’” *Ashcroft v. Iqbal*, 556 U.S.
5 662, 678 (2009), although the Complaint must “give the defendant fair notice of what
6 . . . the claim is and the grounds upon which it rests,” *Erickson v. Pardus*, 551 U.S.
7 89, 93 (2007).

9 If a plaintiff alleges fraud as a cause of action, the plaintiff must plead with
10 particularity the circumstances constituting fraud. Fed R. Civ. P. 9(b). “A complaint
11 alleging fraud meets the Rule 9(b) standard if it alleges the time, place, and content
12 of the fraudulent statements, including reasons why the statements are false.
13 *United States v. Hempfling*, 431 F. Supp. 2d 1069, 1075 (E.D. Cal. 2006) (citing *In*
14 *re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc), *rev’d on*
15 *other grounds*, 60 F.3d 591 (9th Cir. 1995)). “Where fraud allegedly occurred over a
16 period of time, however, Rule 9(b)’s requirement that the circumstances of fraud to
17 be stated with particularity are less stringently applied.” *Id.* Further, “plaintiffs
18 are not absolutely required to plead the specific date, place, or time of each of the
19 fraudulent acts, provided they use some alternative means of injecting precision and
20 some measure of substantiation into their allegations of fraud.” 2 Moore’s Fed.
21 Practice Civ. § 9.03.

22 Motions to dismiss for failure to state a claim are disfavored and rarely
23 granted. *United States v. Hempfling*, 431 F. Supp. 2d 1069, 1075 (E.D. Cal. 2006).
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1 “A complaint should not be dismissed unless it appears beyond doubt that plaintiff
2 can prove no set of facts in support of his claim which would entitle him to relief.”
3 *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). Moreover, in deciding
4 a motion to dismiss, a court “must accept all factual allegations of the complaint as
5 true and draw all reasonable inferences in favor of the nonmoving party.” *Two Rivers*
6 *v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999).
7

8 IV. ARGUMENT

9 The Trustee seeks the avoidance of two general categories of fraudulent
10 transfers made in violation of both state and federal law. The first category of
11 transfers are fraudulent transfers made by the Debtor, AM, and the BW Piezo as
12 alter egos of each other—or transfers made by the Debtor operated as a single
13 enterprise by Blue Wolf Capital Partners—the “Alter Ego Transfers”). These
14 transfers were made in March 2016. The second category of transfers is pled in the
15 alternative—in the event the Court does not make an alter ego determination—
16 includes transfers made by the Debtor to the Blue Wolf Entities, AM, and to third
17 parties not for the benefit of the Debtor (the “No Benefit Transfers”) prior to March
18 2016.
19
20

21 A. Alter Ego Transfers

- 22
23 1. *The Trustee may maintain fraudulent transfer claims under an alter*
24 *ego theory of liability*

25 The Alter Ego Transfers center around the sale of AM and the subsequent
26 disbursement of the proceeds to the exclusion of the Debtor on or about March 2016.
27

1 The Alter Ego Transfers the Trustee may avoid concerning the Mezzanine Lenders
2 include the Payoff and Equity Distributions. The Trustee pleads and contends that
3 the Debtor, AM, and the Blue Wolf Entities operated as alter egos of each other or
4 as a single enterprise, and that justice and equity require that their separate
5 corporate forms be disregarded in relation to the Alter Ego Transfers. This is
6 appropriate because “the separate personality of the corporation is a statutory
7 privilege, it must be used for legitimate business purposes and must not be
8 perverted.” *Shaoxing Cty. Huayue Imp. & Exp. v. Bhaumik*, 191 Cal. App. 4th 1189,
9 1197 (2011). When this privilege is abused, as the Trustee has pled here, the
10 separate personality of the corporation is disregarded. *See id.* Similarly,
11

12
13 under the single-enterprise rule, liability can be found
14 between sister companies. . . . In effect what happens is
15 that the court, for sufficient reason, has determined that
16 though there are two or more personalities, there is but one
17 enterprise; and that this enterprise has been so handled
18 that it should respond, as a whole, for the debts of certain
19 component elements of it. The court thus has constructed
20 for purposes of imposing liability an entity unknown to any
secretary of state comprising assets and liabilities of two or
more legal personalities; endowed that entity with the
assets of both, and charged it with the liabilities of one or
both.

21 *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249–50
22 (1991).

23 The Mezzanine Lenders challenge the Trustee’s ability to avoid the Payoff and
24 Equity Distributions by arguing (1) there was no transfer of an interest in the
25 Debtor’s property; (2) the Mezzanine Lenders are subsequent transferees and
26 accepted the Payoff and Equity Distributions for value, in good faith, and without
27

1 knowledge; and (3) the Equity Distributions are shielded from disgorgement under
2 Section 548(c) of the Bankruptcy Code. These arguments should be rejected.

3 **First**, as explained above, the Trustee pleads that the Debtor, AM, and the
4 BW Piezo operated as alter egos of each other or as a single enterprise, and that
5 justice and equity require that their separate corporate forms be disregarded. SAC
6 ¶¶ 49–62. During this time, the Debtor owned the assets, including through its alter
7 egos. Thus, the transfer of the Payoff and Equity Distributions was comprised of
8 the Debtor’s assets.
9

10 **Second**, based on the same alter ego allegations, the Mezzanine Lenders are
11 not subsequent transferees. Any transfer of assets between the entities operating
12 as one is not an “initial transfer”: “The mere power of a principal to direct the
13 allocation of corporate resources does not amount to legal dominion and control,
14 which is required for initial-transferee status.” *In re Walldesign, Inc.*, 872 F.3d 954,
15 964 (9th Cir. 2017), *cert. denied sub nom. Henry v. Weiss*, 138 S. Ct. 2575 (2018).
16 Moreover, “a principal does not become an initial transferee simply by using his or
17 her control over corporate assets to effect a fraudulent transfer.” *Id.* Here, because
18 the entities were alter egos or a single enterprise, legal dominion and control of the
19 assets underlying the Alter Ego Transfers, including the Payoff and Equity
20 Distributions, did not transfer until March 2016 when they were sold to a third-
21 party and the proceeds were distributed to the Mezzanine Lenders. Thus, the Payoff
22 and Equity Distribution transfers are initial transfers.
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1 **Third**, § 548(c) does not apply to transfers made to the Mezzanine Lenders
2 because the Mezzanine Lenders did not give value to the Debtor. Section 548(c)
3 provides, “a transferee or obligee of such a transfer or obligation that takes for value
4 and in good faith has a lien on or may retain any interest transferred or may enforce
5 any obligation incurred, as the case may be, to the extent that such transferee or
6 obligee gave value to the debtor in exchange for such transfer or obligation.”
7
8 11 U.S.C. § 548(c). The Mezzanine Lenders argue that under this provision, the
9 Equity Distributions are shielded from disgorgement because the distributions total
10 “far less than the \$2,000,000 that the [Mezzanine Lenders] provided the [the Blue
11 Wolf Entities] through their initial investment.” Defs.’ Mot. to Dismiss at 9. But
12 the statutory language is clear; the transferee must give value to the debtor for the
13 exception to apply. Here, the Mezzanine Lenders gave \$2,000,000 to the Blue Wolf
14 Entities—not the Debtor—and the Debtor did not receive any value in exchange for
15 that payment to the Blue Wolf Entities.
16

17 2. *The Trustee sufficiently states claim for the avoidance of actual and*
18 *constructive fraudulent transfers pursuant to the Bankruptcy Code*
19

20 In their Motion to Dismiss, the Mezzanine Lenders do not dispute that they
21 received the Alter Ego Transfers; instead, the Mezzanine Lenders argue that the
22 Trustee has not sufficiently pled enough factual detail that the Mezzanine Lenders
23 participated in the alleged scheme to hinder, delay, and defraud the Debtor
24 creditors. Def.’s Mot. to Dismiss 12.
25

26 This is not the applicable standard. Under the Bankruptcy Code, a
27 liquidating trustee has the authority to enlarge a debtor’s estate by invalidating
28

1 fraudulent transfers, thereby returning the property to the debtor's estate. *In re*
2 *Walldesign, Inc.*, 872 F.3d 954, 959 (9th Cir. 2017) (citing 11 U.S.C. §§ 544(b)(1),
3 548(a)(1)(B)). "When a trustee has proven the avoidability of a fraudulent transfer,
4 the trustee may recover the property or its value from '(1) the initial transferee of
5 such transfer or the entity for whose benefit such transfer was made; or (2) any
6 [subsequent] transferee of such initial transferee.'" *Id.* (quoting 11 U.S.C. § 550(a)).
7 A liquidating trustee has an absolute right of recovery against the initial transferee
8 and any entity for whose benefit such transfer was made. *Danning v. Miller (In re*
9 *Bullion Reserve of N. Am.)*, 922 F.2d 544, 547 (9th Cir. 1991). Thus, the Trustee need
10 not prove that the Mezzanine Lenders was engaged in fraud; the Trustee need only
11 ultimately prove that (1) the transfers at issue should be avoided; and (2) that the
12 Mezzanine Lenders were an initial or subsequent transferee. Indeed, the Mezzanine
13 Lenders do not dispute the Trustee's claims regarding the Blue Wolf Entities. And
14 the Trustee has met the applicable pleading standards at this stage of the litigation
15 as provided below.

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19 ***First***, to prevail on its claims for the avoidance of the Debtor's actual
20 fraudulent transfers, the Trustee must ultimately prove: (1) the transfers involved
21 property of the debtor; (2) the transfers were made within two years of the filing of
22 the debtor's bankruptcy petition; and (3) the debtor made the transfers or incurred
23 the obligations with actual intent to hinder, delay, or defraud any existing or
24 resulting creditor. 11 U.S.C. § 548(a)(1)(A). The Trustee has met its burden of
25 pleading facts establishing a plausible claim for relief and pleading with
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1 particularity the circumstances constituting fraud. In its SAC, the Trustee pleads
2 that the actual fraudulent transfers involved the Debtor's property. *See* SAC ¶ 64
3 ("The following transfers [were made] with property of [the Debtor:]"); ¶¶ 65–79
4 (listing the Debtor's property); *see also* Schedule B 81–116. The Trustee pleads that
5 those transfers covered by the Bankruptcy Code were made or entered into after
6 October 14, 2014, two years prior to the Debtor's bankruptcy petition. *Id.* ¶¶ 65–79.
7 Additionally, in an exhibit specifically incorporated into the SAC, the Trustee
8 provides greater detail regarding the transfers made to or for the benefit of the Blue
9 Wolf Entities, including the period in which the transfers took place, the total
10 amount the transfers amounted to, and for whose benefit the transfers were made.
11
12 *See* SAC Schedule B 81–116.

14 These transfers were fraudulent because they were made in furtherance of a
15 scheme perpetrated by the Debtor's management and controlling shareholder to
16 exhaust the Debtor's assets, preserve AM's assets, and ultimately put the Debtor
17 into bankruptcy, thereby hindering, delaying, or defrauding the Debtor's creditors
18 from being able to collect on debts owed. *See* SAC ¶ 85. The Trustee alleges that
19 the Blue Wolf Entities hindered, delayed, or defrauded the Debtor's creditors by
20 saddling the Debtor with massive debt, operating the Debtor with little cash
21 reserves, and liquidating the Debtor's assets before filing for bankruptcy. *Id.* ¶¶ 40–
22 48.
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1 The fraud did not stop there. “Fraudulent intent may be shown through
2 circumstantial evidence of actual intent to defraud, or ‘badges of fraud.’” *In re Stern*,
3 345 F.3d 1036, 1046–47 (9th Cir. 2003). Such badges of fraud include, *inter alia*:

- 4 • a purported transfer of all or substantially all of the Debtor’s property;
- 5 • insolvency or other unmanageable indebtedness on the part of the Debtor;
- 6 • a special relationship between the Debtor and the transferee;
- 7 • whether the Debtor removed or concealed assets; and
- 8 • whether the value of the consideration received by the Debtor was reasonably
9 equivalent to the value of the asset transferred or the amount of the obligation
10 incurred.

11 *See In re Acequia, Inc.*, 34 F.3d 800, 806 (9th Cir. 1994); *see also Attebury Grain LLC*
12 *v. Grayn Co.*, 721 F. App’x 669, 671 (9th Cir. 2018) (citing Cal. Civ. Code
13 § 3439.04(a)(1)). These badges of fraud are present here. The Trustee asserts that
14 the Blue Wolf Entities schemed by misrepresenting the relationship between the
15 Debtor and AM as a way to conceal assets. SAC ¶¶ 35–39. Then, the Blue Wolf
16 Entities, as part of their scheme, operated the Debtor as an alter ego of or as a single
17 enterprise with AM and BW Piezo. SAC ¶¶ 49–62. They made the Debtor assume
18 massive loan obligations. *Id.* ¶¶ 32–33. During their operation of the Debtor, the
19 Blue Wolf Entities forced the Debtor “to guaranty loans, make payments on loans,
20 and pay liabilities and debts for BW Piezo and [AM].” *Id.* ¶ 83. And the Debtor had
21 commingled funds and assets with BW Piezo and AM. *Id.* ¶ 39. Later, the Trustee
22 alleges that the “transfer of the sales proceeds amounted to substantially all [of the
23 Debtor’s] remaining assets.” SAC ¶ 83. The result was that the Blue Wolf Entities
24 transferred the Debtor’s assets when they sold AM and distributed the proceeds to
25 the exclusion of the Debtor. *Id.* After exhausting the Debtor’s assets to pay for AM’s
26 expenses, the Debtor’s controlling shareholder sold AM, distributed the sales
27 proceeds to insiders and its own creditors; what it did not do is transfer any of the

1 sales proceeds to reimburse the Debtor. Indeed, after denuding the Debtor of assets,
2 the Blue Wolf Entities subsequently put an insolvent the Debtor into bankruptcy
3 and left the creditors of the Debtor “holding the bag”. *Id.* ¶¶ 56–62. Above all, the
4 Trustee meets Rule 9(b)’s demands by providing the dates, amounts, source, and
5 transferee of each transfer. *See* SAC Schedule B 81–116.

6 Thus, the Trustee has alleged sufficient “facts [to] support an inference of
7 actual fraudulent intent.” *See In re Acequia, Inc.*, 34 F.3d at 806. Indeed, the
8 Mezzanine Lenders’ own admissions provide support for the Trustee’s claim that the
9 Blue Wolf Entities’ scheme was fraudulent. The Mezzanine Lenders state that the
10 Debtor directly guaranteed, mortgaged its assets, and made payments for the
11 Mezzanine Loan despite AM allegedly being a separate entity and not the Debtor
12 subsidiary. Defs.’ Mot. to Dismiss at 3–5.

13 ***Second***, to prevail on its claims for avoidance of the Debtor’s constructive
14 fraudulent transfers, the Trustee must ultimately prove: (1) the transfers involved
15 property of the debtor; (2) the transfer were made within two years of the filing of
16 the debtor’s bankruptcy petition; (3) the debtor did not receive reasonably equivalent
17 value in exchange for the property transferred; and (4) the debtor was insolvent on
18 the date the transfer was made or obligation incurred, became insolvent as a result
19 of the transfers made or obligations incurred, or the remaining capital was
20 unreasonably small for the debtor’s business. 11 U.S.C. § 548(a)(1)(B).

21 “Unlike actual fraudulent transfer, Rule 9(b)’s particularity requirement does
22 not apply to constructive fraudulent transfer claims.” *LaChapelle v. Dong Kwan*
23 *Kim*, 2015 U.S. Dist. LEXIS 161801 *20, 2015 WL 7753235 (N.D. Cal. Dec. 1, 2015).
24 Thus, the Trustee need only plead sufficient facts to establish a plausible claim for
25 relief, a burden the Trustee meets and surpasses for the same reasons articulated
26 above in relation to the Trustee’s actual fraudulent transfer claims. In addition, the
27 Trustee has pled that the Payoff and Equity Distributions were constructively

1 fraudulent because the Debtor did not receive reasonably equivalent value, became
2 insolvent as a result of the transfers, and was undercapitalized. *Id.* ¶ 105. The
3 Trustee supports this claim by pleading numerous facts and incorporating by
4 reference a litany of exhibits showing the Debtor paying for liabilities and expenses
5 on behalf of AM and the Blue Wolf Entities without receiving reasonably equivalent
6 value in return. SAC ¶¶ 54, 105, Exs. 14, 19–27, SAC Schedule B 81–116.

7 ***Fourth***, the Trustee also pleads that the Debtor was left insolvent and
8 undercapitalized as a result of these transfers. SAC ¶ 106.

9 3. *The Trustee sufficiently states claim for the avoidance of actual and*
10 *constructive fraudulent transfers pursuant to California law*

11 To prevail on a claim for actual and constructive fraudulent transfer under
12 the California Uniform Voidable Transactions Act, a plaintiff must prove the same
13 elements as under the Bankruptcy Code discussed above. *See* Cal. Civ. Code
14 §§ 3439.04(1) (actual fraudulent transfer); 3439.04(2) (constructive fraudulent
15 transfer). One major difference, however, is that pursuant to the California Uniform
16 Voidable Transactions Act, the statute of limitations is longer. A plaintiff may seek
17 the avoidance of an actual fraudulent transfer made “not later than four years after
18 the transfer was made or the obligation was incurred or, if later, not later than one
19 year after the transfer or obligation was or could reasonably have been discovered
20 by the claimant.” § 3439.09(1). A plaintiff may also seek the avoidance of a
21 constructive fraudulent transfer made not later than four years after the transfers.
22 § 3439.03(2). Accordingly, for the same reasons discussed above, the Trustee has
23 sufficiently plead a plausible claim for the avoidance of both actual and constructive
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1 fraudulent transfers and the Mezzanine Lenders cannot justify dismissal of this
2 claim. SAC ¶¶ 111–156, 201–241.

3 **B. No Benefit Transfers**

4 In the alternative that an alter ego or single business enterprise
5 determination is not made, the Trustee seeks the avoidance of the No Benefit
6 Transfers under both the Bankruptcy Code and California law. The No Benefit
7 Transfers center around the transfer of the Debtor’s assets for the benefit of AM and
8 the Blue Wolf Entities, including professional services rendered by third parties and
9 loan payments. The Alter-Ego Transfers the Trustee may avoid concerning the
10 Mezzanine Lenders include the Debtor Loan Payments.
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13 1. *The Trustee did not receive any value in exchange for transfers made to*
14 *the Mezzanine Lenders*

15 The Mezzanine Lenders argue that the Debtor Loan Payments do not
16 constitute fraudulent transfers because they were made on account of an antecedent
17 debt—the Mezzanine Loan. They argue that payments made on account of the
18 Mezzanine Loan “in exchange for value” are not fraudulent transfers. But, the
19 Mezzanine Lenders do not appreciate that the party making the transfer must be
20 the party receiving value in exchange. *See In re Pajaro Dunes Rental Agency, Inc.*,
21 174 B.R. 557, 578 (Bankr. N.D. Cal. 1994) (“The [reasonably equivalent value]
22 analysis is directed at comparing what the *debtor* surrendered and what
23 the *debtor* received.”). “If a transfer solely benefits a third party, it is clear that the
24 debtor has not received a reasonably equivalent value in exchange.” *Burbank*
25 *Generators, Inc. v. Gill*, 48 B.R. 205, 206 (C.D. Cal. 1985). The focus is not on
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whether the Mezzanine Lenders provided value, the focus is on whether the debtor received value. *See In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (B.A.P. 9th Cir. 1995) (“The question is not, as the [defendants] frame it, whether the [defendants] gave reasonably equivalent value; it is whether the debtor received reasonably equivalent value.”). Numerous courts have grappled with this issue in relation to receiving payments from a debtor that is not receiving any value, and they have found that fraudulent transfer law places the responsibility of actively investigating and tracing the source of funds it receives on the defendants. *Klein v. King & King & Jones, P.C.*, 2:12-CV-00051, 2013 WL 4498831, at *3 (D. Utah Aug. 19, 2013), *aff’d sub nom. Klein v. King & King & Jones*, 571 Fed. App’x 702 (10th Cir. 2014); *see also In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. at 578.

Here, the Debtor did not receive any value from making loan payments to the Mezzanine Lender for the benefit of AM. The Mezzanine Lenders cannot have it both ways. If the Debtor was a separate and distinct corporate entity from the Blue Wolf Entities and AM, then it received no value when it was used as a piggy bank to pay those entities’ liabilities. The Mezzanine Lenders untenable, contradictory positions are in full display when it argues in its Motion to Dismiss both that the Debtor has not established that the Debtor is entitled to the proceeds of the sale of AM and that the loan payments made by the Debtor to the Mezzanine Lenders are in satisfaction of a loan to the Debtor to acquire AM. *Compare* Defs.’ Mot. to Dismiss

Part III.A at 7–8 *with* Part III.B.3 at 17. Accordingly, the Mezzanine Lenders’ argument should be rejected.

2. *The Trustee sufficiently states claim for the avoidance of actual and constructive fraudulent transfers pursuant to the Bankruptcy Code and California law*

First, the Trustee has met its burden of pleading facts establishing a plausible claim for relief and pleading with particularity the circumstances constituting fraud regarding the the Debtor Loan Payments as well. In its Second Amended Complaint, the Trustee pleads in the alternative that the Blue Wolf Entities directed the Debtor’s management to transfer the Debtor’s property to pay for liabilities and professional services for the benefit of other separate entities such as AM, including the Loan Payments transferred to the Mezzanine Lenders. SAC ¶¶ 39, 207–08. The Trustee pleads, and it is undisputed, that some of the the Debtor Loan Payments at issue were made or entered into after October 14, 2014, two years prior to the Debtor’s bankruptcy petition. *Id.* ¶¶ 207–08. In addition, the Trustee has pled that all of the the Debtor Loan Payments covered by California law were made or entered into after October 12, 2014, or within a year of the Trustee’s discovery of the same. *Id.* Additionally, in an exhibit specifically incorporated into the Second Amended Complaint, the Trustee provides greater detail regarding the transfers made for the benefit of the Blue Wolf Entities and AM, including the Debtor Loan Payments made to the Mezzanine Lenders. SAC Schedule B 89–90, 108–09. This exhibit includes the period in which the transfers took place, the total amount the transfers amounted to, and for whose benefit the transfers were made. *Id.* The Trustee has pled that these transfers were fraudulent because they were made in furtherance of a scheme perpetrated by the Debtor’s management and controlling shareholder to exhaust the Debtor’s assets, preserve AM’s assets, and

1 ultimately put the Debtor into bankruptcy, thereby hindering, delaying, or
2 defrauding the Debtor's creditors from being able to collect on debts owed. *See supra*
3 Part IV.B.1 And again, the Mezzanine Lenders' own admissions provide support for
4 the Trustee's claim that the Blue Wolf Entities' scheme was fraudulent. The
5 Mezzanine Lenders state that the Debtor directly guaranteed, mortgaged its assets,
6 and made payments for the Mezzanine Loan despite AM allegedly being a separate
7 entity and not the Debtor subsidiary. Defs.' Mot. to Dismiss at 3–5.

8 ***Second***, the Trustee has met its burden of pleading facts establishing a
9 plausible claim for relief that the Debtor Loan Payments should be avoided as
10 constructively fraudulent transfers. The Trustee pleads in the alternative that the
11 Blue Wolf Entities directed the Debtor's management to transfer the Debtor's assets
12 to pay for liabilities and professional services for the benefit of other separate
13 entities, including AM. Second Am. Compl. ¶¶ 39, 207–08. The Trustee pled that
14 the transfers involved the Debtor's property. *See* SAC ¶¶ 184, 227 (“The following
15 transfers [were made] with property of [the Debtor:]”); ¶¶ 185–195, 228–238 (listing
16 the Debtor's property); see also Schedule B 81–116. The Trustee pled that that those
17 transfers covered by the Bankruptcy Code were made or entered into after October
18 14, 2014, within a period of two years prior to the Debtor's bankruptcy petition. SAC
19 ¶¶ 185–195, 228–238. And again, in an exhibit specifically incorporated into the
20 SAC, the Trustee provides greater detail regarding the transfers made for the
21 benefit of the Blue Wolf Entities and AM, including the period in which the transfers
22 took place, the total amount the transfers amounted to, and for whose benefit the
23 transfers were made. *See* SAC Schedule B 81–116.

24 The Trustee has pled that these transfers were constructively fraudulent
25 because the Debtor did not receive reasonably equivalent value, became insolvent
26 as a result of the transfers, and was undercapitalized. *Id.* ¶¶ 196–97, 239–40. The
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Trustee also pleads that the Debtor was left insolvent and undercapitalized as a result of these transfers. *Id.*

3. *The Trustee Sufficiently States Claims for Avoidance and Recovery of Preferential Transfers*

The Mezzanine Lenders argue that the Trustee cannot bring a claim for avoidance and recovery of preferential transfers because (1) the claim is barred by the statute of limitations; and (2) the Trustee has allegedly failed to plead facts showing the Mezzanine lenders are insiders. These arguments should be rejected for the following reasons.

First, the relation-back doctrine applies to the Trustee's avoidance and recovery of preferential transfers claim.

An otherwise time-barred claim in an amended pleading is deemed timely if it relates back to the date of a timely original pleading. Under Rule 15(c)(1)(B), an amendment asserting a new or changed claim relates back to the date of the original pleading if the amendment "arose out of the conduct, transaction, or occurrence set out ... in the original pleading." An amended claim arises out of the same conduct, transaction, or occurrence if it "will likely be proved by the 'same kind of evidence' offered in support of the original pleading." To relate back, "the original and amended pleadings [must] share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question." The relation back doctrine of Rule 15(c) is "liberally applied."

ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014). Moreover, once litigation has been commenced, an opposing party is on notice that the pleading party may subsequently raise any claims forming part of the same conduct, transactions, or occurrence as the original pleading. *Id.* Thus, "even where

1 amendments go beyond the mere correction or factual modification of the original
2 pleading and significantly alter the claim or defense alleged in that pleading, the
3 search under *Rule 15(c)* is for a common core of operative facts in the two pleadings.”
4 *Id* (emphasis in original).

5 The preferential transfers do not merely rise from the same occurrence or
6 transactions from those transfers alleged in the Trustee’s First Amended Complaint,
7 the transfers are identical. Nor can the Mezzanine Lenders credibly argue that they
8 were not on notice regarding these transfers. A cursory look at the Mezzanine
9 Lenders Motion to Dismiss the First Complaint and some simple arithmetic shows
10 that the Mezzanine Lenders are fully aware that the Trustee is challenging these
11 transfers. In their Motion to Dismiss the First Amended Complaint, the Mezzanine
12 Lenders admit that they received \$14,529,374.68 from the Debtor in March 2016
13 after the sale of AM. Defs.’ Mot. to Dismiss FAC 4–5. A summation of the
14 preferential transfers alleged results in the same total. *See* SAC ¶¶ 276–78.
15 Moreover, the Trustee alleged in its First Amended Complaint that from December
16 2013 to December 2015, the Debtor made payments to the Mezzanine Lenders. FAC
17 ¶¶ 34; FAC 29. Not only were the Mezzanine Lenders on notice of these transfers,
18 the Mezzanine Lenders admitted these transfers took place in their Motion to
19 Dismiss the First Amended Complaint. *See* Defs.’ Mot. to Dismiss FAC 2, 7. The
20 fact that the Court ordered the Trustee to provide more detail regarding the
21 transfers in question does not bar this claim for the same reason that the Trustee’s
22 more detailed fraudulent transfer claims are not barred: they arise out of the
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1 conduct, transaction, or occurrence set out in the original pleading. Thus, the
2 Mezzanine Lender's argument should be denied.

3 **Second**, the Trustee has sufficiently alleged that the Mezzanine Lenders are
4 insiders of the Debtor. "An insider is one who has a sufficiently close relationship
5 with a debtor that his conduct is made subject to closer scrutiny than those dealing
6 at arms length with the debtor." *In re Schuman*, 81 B.R. 583, 586 (B.A.P. 9th Cir.
7 1987). The determination of whether a party is an insider is generally a question of
8 fact that is made on a case-by-case basis in consideration of a totality of the
9 circumstances. *Id.* Here, the Trustee has alleged that the Mezzanine Lenders did
10 not deal with the Trustee as ordinary arms-length lenders; instead, the Mezzanine
11 Lenders entered into investment agreements and owned equity in BW Piezo. SAC
12 ¶¶ 33–34, 65, 67–68. Moreover, the Trustee pleads that the Mezzanine Lenders
13 prevented the Debtor from making any investments or acquisitions during the term
14 of the agreement. *Id.* ¶ 34. These facts must be accepted as true and are sufficient
15 to establish a plausible claim for relief.
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19 **Third**, the Trustee has sufficiently alleged that the Debtor was insolvent at
20 the time of the alleged transfers. The Trustee supports this claim by pleading
21 numerous facts and incorporating by reference a litany of exhibits showing the
22 Debtor was left insolvent and undercapitalized throughout and as a result of these
23 transfers. SAC ¶¶ 44–48, 106. In an attempt to defeat this claim at this stage of
24 the litigation, the Mezzanine Lenders argue how the Trustee must prove insolvency;
25 but, this misses the point. At this stage of the proceedings, without the benefit of
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1 discovery, the Trustee need only plead sufficient facts to establish that the Debtor
2 was insolvent. A hurdle that the Trustee has cleared.

3 **C. Whether Transfers to the Mezzanine Lenders Are Repayments of a**
4 **Fully Secured Obligation Is a Fact Issue**

5 The Mezzanine Lenders argue that transfers the Debtor made to it cannot be
6 fraudulent because they constitute repayments of a fully secured obligation.
7 However, this argument suffers from two defects: (1) it requires the Court to
8 improperly take judicial notice of contested evidence and the Debtor has pled that
9 the Mezzanine Lenders were not fully secured lenders; and (2) the Mezzanine
10 Lenders cannot establish a good faith defense because the Debtor did not receive
11 value from the Mezzanine Lenders.
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13 *First*, the Mezzanine Lenders ask the Court to take judicial notice of the
14 attached documents attached to its Motion to Dismiss to establish a factual issue:
15 that the Mezzanine Lenders perfected their security interest and are fully secured
16 lenders. Typically, parties cannot present—and courts cannot consider—evidence
17 outside of the complaint when deciding a motion to dismiss. But the Court may in
18 appropriate circumstances consider extrinsic evidence using judicial notice. *See Lee*
19 *v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001). Under the Federal Rules of
20 Evidence, courts may take judicial notice of facts that are not subject to reasonable
21 dispute, either because they are “(1) generally known within the territorial
22 jurisdiction of the trial court or (2) capable of accurate and ready determination by
23 resort to sources whose accuracy cannot be reasonably questioned.” Fed. R. Evid.
24 201. For instance, the Court might take judicial notice that April 4, 2019, was a
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1 Thursday, or that a party filed a brief opposing a motion in a state court case.
2 Ultimately, “[j]udicial notice is an explicitly limited doctrine.” *Hsu v. Puma*
3 *Biotechnology, Inc.*, 213 F. Supp. 3d 1275, 1280 (C.D. Cal. 2016).

4 Here, in contrast, the Mezzanine Lenders seek to expand the doctrine’s scope
5 beyond recognition. The Mezzanine Lenders elevate unauthenticated, alleged UCC
6 statements for the truth of the matter asserted. Therefore, the Mezzanine Lenders’
7 arguments relying on perfected security interests have no bearing at this stage of
8 the proceedings. *See Lee*, 250 F.3d at 688 (“[F]actual challenges to a plaintiff’s
9 complaint have no bearing on the legal sufficiency of the allegations under Rule
10 12(b)(6).”); *see also Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (“[Court]
11 must accept all factual allegations of the complaint as true and draw all reasonable
12 inferences in favor of the nonmoving party.”).

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15 Moreover, if the Court were to take judicial notice of the Mezzanine Lenders’
16 documents or convert the Motion to Dismiss as one for summary judgment, the
17 Court should afford the Trustee the opportunity to take discovery, which has been
18 stayed for the length of this case at Defendants’ request. *See Singh v. Am. Honda*
19 *Fin. Corp.*, 925 F.3d 1053, 1076 (9th Cir. 2019) (noting that “a district court may not
20 grant a motion to dismiss which has been converted into a summary judgment
21 motion without furnishing all parties an opportunity to supplement the record”).
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23
24 **Second**, the Mezzanine Lenders cannot establish the good faith defense
25 based on the pleadings because the Trustee pleads that the Mezzanine Lenders did
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not provide value to the Debtor. Section 548(c) protects a good faith initial transferee to the extent value is given to the Debtor:

a transferee or obligee of such a transfer or obligation that takes ***for value and in good faith*** has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, ***to the extent that such transferee or obligee gave value*** to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c) (emphasis added); *see also Gladstone v. Schaefer (In re UC Lofts on 4th, LLC)*, 2015 WL 5209252, *16–17 (9th Cir. BAP Sep. 4, 2015). the Debtor pleads that, in the alternative that an alter ego determination is not made, the Mezzanine Lenders only provided value to BW Piezo, AM, and the Blue Wolf Entities—not to the Debtor. *See* SAC ¶¶ 33–38. In its Motion, the Mezzanine Lenders hide this deficiency by arguing that they provided value to the “Loan Parties” to acquire the “Target”—the assets that formed AM; however, the Loan Parties are defined to include BW Piezo and AM. Pls.’ Mot. 17. Moreover, the Mezzanine Lenders allegations regarding providing value to the Debtor contradict and defeat the Mezzanine Lenders argument that the transfer of sale proceeds are not of the Debtor’s property. Thus, based on the pleadings, the first element of the good-faith defense is unavailable to the Mezzanine Lenders.

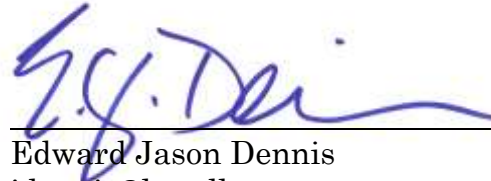
V. CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the Court deny the Mezzanine Lenders’ Motion to Dismiss in its entirety, and for any other and further relief, at law or in equity, to which it is justly entitled. Further, in the event the Court grants the Mezzanine Lenders’ Motion to Dismiss, the Trustee

respectfully requests further opportunity to amend and that any such dismissal be without prejudice. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (holding that when dismissing a complaint for failure to state a claim, “a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.”).

Dated: August 27, 2019

Respectfully submitted,



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**Special Litigation Counsel for
Corporate Recovery Associates, LLC,
Trustee for the Liquidating Trust of
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PROOF OF SERVICE

STATE OF TEXAS, COUNTY OF DALLAS

I am employed in the County of Dallas, State of Texas. I am over the age of 18 and not a party to the within action; my business address is 2100 Ross Avenue, Suite 2700, Dallas, Texas 75201.

On August 27, 2019, I caused the document described below as **RESPONSE TO DEFENDANTS FIDUS INVESTMENT CORPORATION, FIDUS MEZZANINE CAPITAL II, L.P., AVANTE MEZZANINE PARTNERS SBIC, LP, AVANTE MEZZANINE PARTNERS II, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT** to be served on all interested parties in this action via email:

SEE ATTACHED SERVICE LIST

☐ **(BY MAIL)** I caused such envelope(s) fully prepaid to be placed in the United States Mail at Dallas, Texas. I am "readily familiar" with the firm's practice of collection and processing correspondence or mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Dallas, Texas in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY OVERNIGHT-FEDERAL EXPRESS)** I caused said document(s) to be picked up by U.S. Federal Express Services for overnight delivery to the offices of the addressees listed on the Service List.


☐ **(BY PERSONAL SERVICE)** I caused to be delivered such document by hand to the above-identified recipient through the use of First Legal Attorney Service whose address is: 1517 West Beverly Boulevard, Los Angeles, CA 90026, and whose telephone number is (213) 250-1111.

☐ **(BY FACSIMILE)** I caused said document(s) to be telephonically transmitted to each addressee's telecopier (Fax) number as noted.

☒ **(BY ELECTRONIC MAIL)** I caused said document(s) to be served via electronic transmission to each addressee's electronic mail address(es) as noted on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 27, 2019, at Dallas, Texas.


Emily Burch

SERVICE LIST

**United States Bankruptcy Court – Central District of California
Northern Division**

Case No. 9:18-AP-01058-DS

Our File No. 03349.801

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